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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1639

ROBERT D. TUCKER, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Robert D. Tucker, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Texas Court of Criminal Appeals, which affirmed the judgment of conviction of the 178th Judicial District Court of Harris County, Texas.

OPINIONS BELOW

The trial Court's opinion in the judgment of conviction was filed on April 21, 1969; Petitioner was sentenced to

ninety-nine (99) years; the Court of Criminal Appeals opinion was filed on November 25, 1970 (Appendix A); rehearing was denied on 1-27-71 (Appendix B).

JURISDICTION

The judgment of the Court below was entered on November 25, 1970, (Appendix A), and the order denying rehearing was filed on 1-27-71 (Appendix B). The jurisdiction of the Court is conferred by 28 U.S.C.A. Section 1254 (1).

QUESTIONS PRESENTED

1. Was the failure of the trial court to grant a mistrial (upon objection by the defense) when the State introduced testimony of the trial, conviction, and sentence to death of the principal Akridge in the trial of accomplice Petitioner, error?
2. Was the cautionary charge adequate to remove from the minds of the trial jury the knowledge that the principal had been convicted and sentenced to the extreme penalty of death, by another trial jury?
3. Did the Texas Court of Criminal Appeals create error when it sustained the conviction and sentence returned in the trial court, by finding that the evidence was not improper, but actually permissive?
4. Is the practical effort of this deliberate evidentiary tender, a denial of the federally protected right to

confrontation and cross-examination under the Sixth Amendment, and a denial of due process under the Fourteenth Amendment?

5. Did the District Court commit error when it refused to grant a motion by the defense for a mistrial on the improper tender of the "Murder Incorporated" testimony?

6. Was the cautionary charge adequate to remove this fundamentally destructive statement from the minds of the trial jury?

7. Did the District Court commit error when it refused to grant a mistrial on motion by the defense, after the prosecutor improperly stated to the Court in the jury's presence, that the State had lie detector tests showing Petitioner's guilt?

8. Were the actions of the State prosecutor, pursuant to his trial tactical approach to the case, improper; did this tactic materially perjurdice the Defendant's trial in violation of his right to due process?

9. Was the cumulative weight of error occasioned by this trial technique of the State's prosecutor sufficient to constitute a frustration of the basic right to a fair trial and due process thereon?

10. Did the ruling on this case by the Texas Court of Criminal Appeals, which allows introduction of the results of another jury trying, conviction, and sentencing the principal, based on evidence and testimony never disclosed to this trial jury, conflict with the federally protected right to confrontation and cross-examination on *all* witnesses whose testimony is allowed against Defendant?

STATEMENT OF THE CASE

This is an appeal from a ninety-nine (99) year sentence imposed on the Petitioner after a trial under an indictment charging the compound offense of accomplice to murder

The indictment was predicated on two main averments; the first allegation is that Robert Edward Akridge, Roy Franklin Brashier and Delmonte Whitehurst did with malice aforethought kill Dr. Robert Pendleton; the second allegation in the indictment is that the Petitioner Tucker was an accomplice to the murder.

The State's star witness was Delmonte Whitehurst, principal. He confessed his complicity in the homicide and gave testimony indicating that he along with co-defendants Brashier and Akridge planned the details of the killing and that Akridge actually carried out the killing while Whitehurst and Brashier waited in a car nearby.

Whitehurst first gave a confession only implicating Brashier and Akridge; he later, after visits from the district attorney, gave a second confession and implicating Petitioner, Dr. Burkhalter, and Jimmie Steambarge.

Co-defendant Akridge, the alleged triggerman, and a principal, was tried first, convicted, and sentenced to death in the electric chair. Petitioner was tried next as an accomplice (under the Texas law on principals and accomplices) to the crime of murder.

The State used the co-defendant principal Delmonte Whitehurst as its inculpatory chief witness and did not prosecute him; Whitehurst testified Petitioner tried to get him to locate someone to kill Dr. Pendleton; two other witnesses were used to corroborate the fact that Petitioner was allegedly seeking Whitehurst for this purpose.

After Petitioner was arrested the first time he was taken to the Pasadena, Texas Police Station and given a polygraph (lie detector) test and subsequently released; he was later arrested when indicted on this cause.

Petitioner was called to trial and found guilty and received a sentence of ninety-nine years in the Texas Penal System from which he timely and unsuccessfully appealed to the Texas Court of Criminal Appeals (Appendix A).

EVIDENCE DEVELOPED AT THE TRIAL

The evidence presented by the State reflected that Petitioner had worked at the hospital where Dr. Burkhalter (defendant) and Dr. Pendleton (deceased) were co-owners; that he had terminated his employment after the doctors began their fight for control of the hospital.

The Petitioner's main involvement according to the testimony of Whitehurst (co-principal) was his several trips seeking Whitehurst and later talking to Whitehurst to find a killer for Dr. Burkhalter, who supposedly wanted to have Dr. Pendleton killed.

In addition, Petitioner was supposed to have attended a meeting at a cafeteria before the killing, with the co-defendants, but did not take part in the discussion.

Petitioner did not personally fire the shot that killed Dr. Pendleton; he was not present when the killing occurred; he did not actually hire or aid in hiring Robert Akridge (if Akridge did the shooting) to kill Dr. Pendleton; he did not find, deliver or have any thing to do with producing and later securing the murder weapon; he had no actual part in the planning or carrying out the actual killing according to State's inculpatory witness Whitehurst.

The testimony of the principal Whitehurst was the necessary inculpatory evidence needed to connect Petitioner with the homicide. Most of the trial testimony consisted of facts surrounding the investigation and the physical evidence relating to the co-defendant principal Akridge.

Several witnesses testified Petitioner asked them for Whitehurst, and that he was trying to find Whitehurst.

Petitioner did not confess to the homicide; he maintained his innocence throughout the trial and stands before this Honorable Court in that posture.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V., United States Constitution:

> ". . . nor shall be compelled in any criminal case to be a witness against himself."

Amendment V., United States Constitution:

> ". . . nor be deprived of life, liberty, or property, without due process of law."

Amendment VI., United States Constitution:

> ". . . to be confronted with the witnesses against him. . .".

Amendment XIV., United States Constitution:

> ". . . no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . .".

Article 70, Vernon's Penal Code of the State of Texas:

> ". . . an accomplice is one who is not present at the commission of an offense, but who, before the act is

done, advises, commands, or encourages another to commit the offense. . . .".

Article 65, Vernon's Penal Code of the State of Texas

Principals:

". . . all persons are principals who are guilty of acting together in the commission of the offense. . . ."

Article 1, Section 10, Texas Constitution:

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The opinions below raise important constitutional procedural and substantive questions relating to:

a. Right to confrontation and cross-examination under the Sixth Amendment to the United States Constitution;

b. Right to due process under the Fourteenth Amendment to the United States Constitution;

c. Denial of the right to equal protection of the laws under Article 1, Section 10, Constitution of the State of Texas;

d. Scope of proper professional conduct by prosecutors.

e. In addition, the opinion of the Court of Appeals of the State of Texas adopts a new interpretation of the Texas Law of principals and accessories which is in direct conflict with the federally protected trial right to confrontation and cross-examination under the Sixth Amendment to the United States Constitution.

1. The Texas law requires that the State must prove beyond a reasonable doubt the guilt of the named prin-

cipals, and the State may use all competent evidence to do so, before the jury can find the accomplice guilty.[1]

The Texas Appeals Court in this case ruled that the opinion in the case of *Tuttle v. State,* 49 S.W. 82 was such that it provided authority for the proposition that the conviction, and sentence of the principal is admissible in the trial of the accomplice.

It was on the basis of the *Tuttle* Case, supra, that the Texas Court of Criminal Appeals upheld the right of the prosecution to introduce these extra judicial (insofar as this trial jury is concerned) exhibits as part of the proof to convince the trial jury that the principal Akridge was guilty.

The trial Court sustained the defense objection to the evidence, although it denied the mistrial motion (R. 118 to 119); and then instructed the jury to disregard the question and answer for any purpose.

Until the Texas Appeal Court's decision in this case, there were no Texas cases since the turn of the century, on this subject. The case law is silent for over seventy (70) years on this point. The trial judge was partially correct when he sustained the objection, but he was unrealistic when he assumed the cautionary charge would effectively have any real influence on removing this highly critical evidence from the minds of the trial jurors.

Texas trial on accomplices have historically followed the pattern of the prosecutor presenting his evidence, by witnesses, documentation and/or physical exhibits to prove beyond a reasonable doubt the guilt of the principal.

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1. *Peddy v. State,* 118 Tex. Cr. R. 603, 40 S.W.2d 153; *Ashton v. State,* 136 CR. R. 12, 122 S.W.2d 1073; *Tucker v. State,* No. 43,266, Appendix B.

In the *Kaufman* case[2] the Texas Appeals Court recognized that Texas law required that the State prove two (2) material elements in order to convict the accomplice:

a. Proof by competent evidence that the principal was guilty beyond a reasonable doubt of the offense charged;

b. That the accomplice was then guilty of being an accomplice to the crime of the principal.

In order to satisfy the first requisite, the State brought out the fact of the earlier trial, conviction and sentence to death, of the principal Akridge; this was done to give weight in the minds of the trial jurors, to the questionable credibility of the State's star witness Whitehurst.

While the trial court recognized in part, the improper tender, it assumed the cautionary instruction would be adequate to eliminate the danger of prejudice to the Defendant.

The question asked reflecting this prejudicial tender commences at R. page 118, lines 11 to 25, page 119, lines 1 to 10 inclusive:

Question: (D. A. James)
He asked you about the differences a while ago in the two statements. State's Exhibits 26 and 27, and you said there were two differences you recall, one concerning the rifles and the other the cars. Can you tell this jury why there was a difference?

Answer: (Witness Whitehurst)
My nephew had already given a statement of committing and being the triggerman and he picked the gun and the car. I went along with him. When we got to

2. *Kaufman v. State,* 70 Tex. Cr. R. 438, 159 S.W. 58.

Newton (Texas) on the cattle theft charges, I promised not to testify in court and would not do any thing to see him get the death penalty, and if he got it, he would get it on his own.

Question: (D. A. James)
Did he?

Answer: (Whitehurst)
Yes, sir.

The law in Texas recognizes that an accomplice may defend on the ground that the principal is not guilty, and if the principal has already been convicted the accomplice has the right to still contest the principals guilt.[3]

It is further the law in Texas, that should the State fail to establish the guilt of the principal beyond a reasonable doubt, the alleged accomplice must be acquitted, for there can be no accomplice without a guilty principal.[4]

The two immediate fundamental questions for the Court on this point are:

1. Is the Texas Court of Appeals ruling that the State can introduce the results of the trial jury's conviction and sentence of the principal, constitutionally permissive under the Sixth Amendment?
2. If it offends the Sixth Amendment, was the cautionary charge to the jury adequate to purify the contamination of the tender of the conviction and death penalty?

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3. Law of Principals, accomplices and accessories by Judge W. A. Morrison and George P. Blackburn, P XIII to XXVIII, Penal Code of the State of Texas.

4. *Ashton v. State*, 122 S.W.2d 1073.

Petitioner contends that the introduction of this evidence offends the federally protected right to confrontation and cross-examination guaranteed by the Sixth Amendment.

This type testimony falls into the same category as extra judicial confessions, and examining trial transcripts, which this Honorable Court has held to due offense to the Sixth Amendment.

In the *Pointer* case, supra,[6] the court recognized the right of confrontation and cross-examination as an . . . "essential and fundamental requirement for the kind of trial which is this country's constitutional goal." In *Barber*, supra,[7] the court recognized that this Sixth Amendment right was . . . "a basic trial right."

The Texas Court, in conformity with the *Pointer* case, supra, recognized the constitutional bar to the extra-judicial confession, and the examining trial transcript.[8]

The invasion of the fact determination of the accomplice's trial jury on the question of guilt or innocence of the principal, by use of testimony of the conviction and sentence to death is more offensive to the Sixth Amendment right to confrontation and cross-examination than the use of the extra-judicial confession or the examining trial transcript.

In this instance, the trial jury, who is charged with considering all the relevant testimony and evidence and mak-

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6. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065.

7. *Barber v. United States*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed. 255; *Maddox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895).

8. *Shepps v. Texas*, 432 S.W.2d 926.

ing a determination of whether the guilt of the principal has been proved beyond a reasonable doubt or not, *before* deliberating on whether the evidence showed the Defendant to be an accomplice thereto, does not have before it the numerous witnesses, who testified in the principals trial, the argument of counsel in that trial, or the impressions, assumptions, presumptions and conclusions that go to make up the individual juror's opinion in that case.

What the State can now do, if this decision stands, is to introduce the judicial record of another faceless jury's determination in the trial of the principal, and for all realistic purposes, eliminates any meaningful opportunity for the defense to contest this first critical element of proof.

If the Court finds that the decision to allow this testimony offends the Sixth Amendment and the Fourteenth Amendment then the second question must be considered.

Was the cautionary charge, under these circumstances, an effective vehicle in wiping out of the juror's minds, this very prejudicial and critical testimony?

This Court has realistically faced this problem on numerous occasions. As in the *Krulewitch* Case[9] the Court recognized the futility of the instruction to disregard the damaging testimony.[10]

The impact on the minds of Petitioner's trial jury was so devastating that the instruction was totally ineffective; what doubt on the principal's guilt that the jurors might have had prior to that testimony was effectively eliminated by this evidence.

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9. *Krulewitch v. United States,* 336 U.S. 440.

10. Judge Hand in *United States v. Grunewald,* 233 F.2d 556; Wigmore, N. 3, S. 2272 at p. 416.

A Writ of Certiorari should issue on this point; the highest Court in the State of Texas has rendered an opinion in conflict with the Sixth Amendment of the United States Constitution, on the right to confrontation and cross-examination.

2. The district court erred in failing to grant a mistrial when the State injected the "Murder Incorporated" testimony without first establishing an evidentiary predicate.

This was done by the State's inculpatory cooperative witness Whitehurst.

The entire record reflects no such organization was ever formed, or ever existed in Texas; the inflammatory use of this commonly known "Mafia organization" was introduced solely to prejudice the Defendant because of the impact on the trial jury.

This was the first of many improprieties committed by the prosecutor (which will be set out in a later point of error as a denial of a constitutional right to due process).

The Court of Criminal Appeals in its opinion (Appendix A) cited excerpted lines out of context, which do not correctly reflect the totality of the evidence of the testimony of Delmonte Whitehurst.

One of the primary reasons for affirming the opinion, and holding the "Murder Incorporated" testimony permissive was an erroneous assumption and the misreading of the trial record on Whitehurst's testimony.

The record clearly reflects that on page 448, lines 7 to 9, the district attorney, without any predicate asked the following question to Whitehurst (who was the chief inculpatory witness for the State):

Question: (District Attorney)
All right. Did you prior to December 9, 1966, ever discuss and set up a "Murder Incorporated"?

Objection:
Motion for mistrial
Overruled by the Court. (R. 448)

The district attorney then, in complete disregard to the Court's instruction, immediately asked the same question, and drew an admonition from the Court.

Finally, the Court allowed the testimony to be placed before the jury (R. 541, lines 22 to 23). Although the totality of the record reflected no such organization was ever mentioned in the presence of any of the co-defendants; nor did the homicide have anything to do with any such organization.

Repeated hearsay remarks, and improper questions by the prosecutor kept this issue before the jury (R. 336, lines 15 to 19).

Counsel for the State, whenever blocked by objection and a Court ruling, ignored both and got his evidence into the record by improper side bar remarks, or improper questions asked in the manner recognized by this Court in the case of *Burton v. United States,* 391 U.S. 123, 20 L.Ed. 476 to be improper.

The admonition to disregard the testimony was of little effect to the jury; *Krulewitch v. United States,* 336 U.S. 440, and the subsequent erroneous admission eliminated any hope of a fair trial free from inflammatory and prejudicial influence on the jury.

The error was compounded by the prosecutor arguing the "Murder Incorporated" theory to the jury (R. 805)

(R. 833) when in truth and fact a careful reading of the record reflects this entire "Murder Incorporated" conversation was not made relative to the object of any conspiracy, *nor in furtherance thereof,* nor is there any testimony, that any other Defendant, including Petitioner herein, had any knowledge of this product of a drinking session by the State's chief inculpatory witness (who, while not reflected in the judgment record before this Court, has been released from all charges, and has recanted the "Murder Incorporated" testimony in a civil deposition under oath growing out of the homicide) Whitehurst.

Petitioner was denied "due process" by this inflammatory evidentiary injection by use of the improper question vehicle; the later admission of the question compounded the error.

Petitioner was the victim of a State conceived plan to inflame the minds of the trial jury against Petitioner, and this was one of the numerous improper tactics used against him.

A Writ of Certiorari should be granted to review the totality of the prejudice and the erroneous interpretation of the record by the Court of Criminal Appeals; as well as a review of the actions of the State's prosecutor in offending every concept of orderly, proper, and fair presentment of his (the State's) case.

3. The third significant federal question involves the statement of the prosecutor in the presence of the jury, that the State wanted to introduce lie detector tests showing his (Defendant's) guilt.

The comment which Petitioner relies on as constituting reversible error and a gross denial of due process, followed a question by the defense counsel:

Question:
Robert, when you was taken to the Pasadena Police Station, were you asked to take a lie detector test?

Answer:
Yes, sir (R. 665)

District Attorney (Mr. James)
We will have no objection to this, *if we are allowed to show any lie detector tests showing his guilt.*

Objection and mistrial motion made by Defendant.

Objection sustained, mistrial motion denied, and jury instructed to disregard the remark of counsel and not to consider them for any reason (R. 665, lines 14 to 20).

Prior to the commencement of trial, the State (through Mr. James) (prosecutor) filed a "Motion in limine" asking for an order prohibiting the defense counsel from asking any questions about the polygraph test, or the results thereof, on the ground that the test results were not recognized as valid evidence, and could not be placed before the jury.

The State's prosecutor knew the test results were highly improper, as his own pleading prior to trial indicated (R. 66 to 68).

In a colloquy with the Court the prosecutor stated in support of his Motion in Limine, as follows:

". . . The matter included in our motion in limine has been well established as not admissible evidence. We are asking the Court not to allow them to introduce any inadmissible evidence. (R. 68, lines 1 to 5).

It has been long established, any lie detector test has long been held inadmissible." (R. 68, lines 17 to 21)

The trial court advised the State's attorney that he was overruling the motion in limine,

> ". . . without prejudice to the right to interpose *any objection concerning such matters that might arise in the trial of the case.* . . . This is without any prejudice to right of the State *to interpose any objection* concerning these matters should they arise in the course of the trial. That's the Court's ruling." (R. 69, lines 1 to 11)

The lack of good faith, and intent to injure the Defendant is obvious; the State's attorney *knew* the law; was under the court's admonition to . . . "interpose any objection concerning such matters (lie detector tests) that might arise in the trial of the case."

To deliberately state in the jury's presence, (instead of simply objecting as the Court had admonished State's counsel to do) that the State would not object . . . "if we (State of Texas) are allowed to show any lie detector tests showing his guilt" is improper conduct of the rankest sort.

Not only did the prosecutor know that the lie detector test was not consistent with guilt (as his motion in limine ably reflects) but he also knew that he should "interpose such objection as are necessary" as the Court had admonished him to do; the fact that he did neither, but instead, sought to strike a foul blow by not only violating the court's admonition, but more seriously, deliberately giving false impressions of having tests showing guilt instead of the tests being consistent with innocence.

The Court of Criminal Appeals erroneously held that the question by the defense "opened the door" to this line of inquiry by the State.

The reasoning of the Texas Court is hard to follow since there was no line of inquiry by the State nor was there any "opening the door" to rebuttal testimony. Instead, the prosecutor ignored the Court's orders, the Texas law on lie detector tests that was well known to the prosecutor, and the rules of evidence and decorum when he made *not an objection,* but a devastatingly harmful, improper comment to the Court in the jury's presence.

Could the juror's eliminate from their minds the destructive impact of the knowledge that the State's attorney alleged he had in his possession two or more lie detector tests showing guilt?

This is a weak case, where corroboration of State's witnesses was slender, and where the credibility of the Defendant who denies his guilt and participation in the killing was critical to the defense, the alleged lie detector tests disclosed to the jury by this remark effectively excluded any chance of reasonable doubt about the credibility issue relating to the Defendant.

The cautionary charge, while well intended, and while effective in those cases where minor error is involved, was totally inadequate to cope with the prejudice against the credibility of the Defendant, and on the fundamental issue of guilt.[11]

The entire episode reflects the deliberate abuse of the position of the prosecutor, and a total lack of concern for his obligations as set forth by this Court in the *Berger* case.[12]

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11. *United States v. Gruenwald,* 233 F.2d 556.

12. *Berger v. United States,* 295 U.S. 78.

An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the guilt or innocence issue. *Burton v. United States,* supra.

Mr. Justice Steward, in concurring stated:

> ". . . certain kinds of hearsay are at once so damaging, so suspect, and yet so difficult to discount that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, whatever the Court's instructions. . .".

Mr. Justice Black, concurring in the result stated:

> ". . . An admonition to the jury was and is so ineffective in that the effect of such confession cannot be wiped from the brains of the jury."

The opinion of this Court in *Berger,* supra, went on to say:

> ". . . The admonition therefore became a futile colloquation of words and fails of its purpose as a legal protection to the Defendant against whom such declaration should not tell . . . further . . . the government should not have the windfall of having the jury be influenced by evidence against a Defendant which, as a matter of law they should not consider, but which they cannot put out of their minds."

Mr. Justice Brennan citing the *Krulewitch* Case[13] reiterated the truism that:

> ". . . the naive assumption that the prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction. . ."

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13. *Krulewitch v. United States,* 336 U.S. 440, 453, 93 L.Ed. 790, 69 S.Ct. 716.

The law is clear that the comment on the results of the tests was inadmissible. The prosecutor knew this, and deliberately made the comment in disregard of his obligation and duty.

The harm to the Petitioner is obvious; this remark struck at the heart of the defense and destroyed it.

A Writ of Certiorari should issue on this constitutional point in which the actions of the State's district attorney were in direct violation to his legal, moral, and ethical responsibility to insure that an accused be afforded a fair and impartial trial with all the safeguards of due process.

4. The trial tactic of the State's prosecutor constituted a denial of the federally protected right to due process under the Fourteenth Amendment, and a denial to equal protection of the laws under Article 1, Section 10, of the Constitution of the State of Texas.

The prosecutor repeatedly and with obvious design and intent, used improper questions, side bar remarks and comments in the presence of the trial jury. On appeal Petitioner pointed out some twenty-three (23) instances of the improper questions being used, twelve (12) instances of the side bar remarks and comments, and twenty-seven (27) instances of an attempt to introduce improper, prejudicial, and inflammatory evidence pursuant to this premeditated trial tactic.

The evidence was based on the tying down identification of a cigarette lighter found on the murder scene (R. 308); the color and type of boots allegedly worn by principal Akridge (R. 314, 343); the number of times Petitioner met Whitehurst (State's key witness) at the home of witness Joyce Haley (R. 351); the identification of rubber gloves and an alleged mannerism of co-defendant

Akridge (R. 364); and the proof of a "Murder Incorporated conspiracy" existing between Petitioner and other co-defendants (R. 336); and the correct identification of the Murder car (R. 462).

To further create hostility to Petitioner Tucker, repeated attempts were made to introduce extraneous, non-relevant matters including:

a. Evidence of an injunction allowing the deceased Dr. Pendleton to return to the hospital to practice. (against untried co-defendant Dr. Burkhalter) (R. 445);

b. The commitment of Dr. Pendleton (deceased) on a lunacy warrant by Dr. Burkhalter (R. 463);

c. and again as leading question at page 6807 the record;

d. Evidence of an unproved alleged termination of employment of Petitioner from hospital (R. 724);

e. Suggesting documents missing without offering proof thereof, to imply Petitioner Tucker was guilty of destruction thereof (R. 724) and again on page 725 of Record;

f. Attack on defense counsel not prompted by an impropriety on part of defense counsel (R. 411) and again on page 411 of record (He was admonished by the court (R. 441);

g. Attempting to show other employees of hospital left when Dr. Burkhalter resigned (R. 442);

h. The lie detector test remark objected to and discussed above (R. 655, lines 4 to 25);

i. Prosecutor's guarantee that no promise of immunity was given to induce co-defendant Whitehurst to testify on behalf of the State. This was to bolster the credibility of Whitehurst (R. 752);

j. Use of testimony type statement to lead witness and have jury hear answers before objection could stop it on "Murder Incorporated" (R. 336, and repeated on R. 337 and 735, lines 2 to 19);

k. Attempt to use brother of the deceased to testify that Defendant Tucker had once told him he had worked as a bellhop at a Houston hotel, and that his major source of income was not from tips (Implying prostitution) (R. 440, line 8);

l. Prosecutor remarking to Court before jury during cross-examination that his witness Whitehurst had only given two statements and not three as the defense was seeking to develop.

m. Side bar remark on whether the confessions of State's witness conflicted with each other (R. 471, lines 6 to 12);

n. Using questioning as a device to get before the jury the highly prejudicial non-relevant point that co-defendant Dr. Burkhalter had operated on a horse in the hospital operating room (R. 637, lines 3 to 14);

o. Use of "Murder Incorporated" theory in argument when no testimony ever reflected the actual existence of such an organization or its connection to the homicide. (R. 883, line 9)

These specific improper acts were coupled with innumerable leading, suggestive and damaging questions which placed before the trial jury much suggestion, innuendo and inferences of improper matter, or of badly needed corroborative matters.

The trial court repeatedly sustained objections, admonished the State's attorney and gave instructions to the jury to try to eliminate this harm.

See a summation of the number of times in the record this tactic was used (Appendix C.).

A second and more fundamental example of unfair and improper conduct was the use of remarks, comments and/or out right unsworn testimony by the State's prosecutor (Appendix D.).

The third series of improper conduct constituted the most critical travesty of the rules of evidence reflected as follows:

1. Prosecutor exhibits items not in evidence. Objection sustained by court, *Prosecutor instructed not to do so* (R. 268).
2. "Murder Incorporated" question. Objection sustained (R. 336).
3. Prosecutor suggests critical boot color to bolster witness Haley's testimony. Objection sustained (R. 343).
4. Prosecutor eliciting prior trial, conviction and sentence to death of co-defendant. Objection sustained. Mistrial denied. *Jury instructed to disregard* (R. 339).
5. Prosecutor makes personal attack (in jury presence) on defense counsel. Objection sustained; *jury instructed to disregard the remarks* (R. 402).
6. Prosecutor accuses defense counsel of quoting lies in cross-examination. Objection sustained. *Jury instructed to disregard remarks* (R. 411).
7. Prosecutor seeks by hearsay to develop allegation of immoral conduct by Defendant, objection sustained (R. 440).

8. Prosecutor commenting in jury's presence that co-defendant Burkhalter, is indicted in same case. Objection sustained (R. 442).

9. Prosecutor suggesting answer to critical inculpatory witness. Objection, question withdrawn (R. 455).

10. Prosecutor testifying to facts not in evidence. Objection sustained. *Jury instructed to disregard* (R. 465).

11. Prosecutor's remark on lie detector tests showing "guilt". Objection sustained, mistrial denied. *Jury instructed to disregard.* (R. 665, lines 8 to 11).

12. Prosecutor in improper question brings up horse operation by co-defendant. Objection sustained, mistrial denied. *Jury instructed to disregard question* (R. 637, lines 3 to 4).

13. Prosecutor testifying by commenting in jury's presence of ownership interest of co-defendant in Hospital. Objection sustained. *Jury instructed to disregard* (R. 670).

14. Prosecutor using leading question to get before jury allegation that Defendant Burkhalter had caused the deceased Dr. Pendleton to be committed on a lunacy complaint. Objection sustained. *Jury instructed to disregard* (R. 680).

15. Prosecutor using leading question to suggest the deceased had asked his brother, to look for defendant's resignation. Objection sustained. *Jury instructed to disregard* (R. 724).

16. Prosecutor still pursuing missing record theory, asked witness if he knew this record was missing. Objection sustained (R. 724).

17. Prosecutor still disregarding Court's ruling, asked improperly if witness knew of any *other* missing hospital records. Objection sustained (R. 724).

18. Prosecutor suggests to main corroborative witness Haley that she "heard" co-defendants discuss setting up "Murder Incorporated". Objective sustained. Mistrial denied. *Jury instructed to disregard* (R. 735).

19. Prosecutor in argument, making a *"personal guarantee"* that their inculpatory witness was not promised any thing to induce him to testify (R. 752). *Jury instructed to disregard* (R. 752).

An element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence. *Burton* Case, supra.[14] The proper conduct of the prosecutor was clearly set forth by this court in the *Berger* Case.[15]

Mr. Justice Steward also observed in *Burton,* supra:

> ". . . certain kinds of hearsay at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence minimal weight it logically deserves, whatever the court's instruction."

Mr. Justice Black in concurring stated:

> ". . . An admonition to the jury was and is ineffective in that the effect of the confession cannot be wiped from the brains of the jury."

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14. *Burton v. United States,* 391 U.S. 123.

15. *Berger v. United States,* 295 U.S. 78.

This Court went on to observe:

> ". . . The admonition therefore becomes a futile colloquation of words and fails of its purpose as a legal protection to the Defendant against whom such a declaration should not tell . . . further . . . the government (State of Texas here) should not have the windfall of having the jury be influenced by evidence against a Defendant which, as a matter of law they should not consider, but which they cannot put out of their minds."

Mr. Justice Brennan citing the opinion of the Court in the *Krulewitch v. United States,*[16] reiterated an obvious truth known to all knowledgeable trial practitioners that:

> ". . . That the naive assumption that the prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

Petitioner Tucker raised the impropriety of these unprecedented actions by the State's attorney at the Texas Appeal Court level (See Appendix B); that Court did not actually rule on the point; the opinion is suggestive and the Defendant submitted by motion for rehearing, a detailed summation of the objectionable incidents as suggested by the Courts; this was overruled *without* written opinion by the Texas Court. Petitioner has no way to interpret the view of the Texas Court.[17]

Petitioner was not attempting to join the many individual remarks, comments or acts into one point to ap-

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16. *Krulewitch v. United States*, 336 U.S. 440, 453, 93 L.Ed. 790, S.Ct. 716.

17. Appendix B.

peal them all. Petitioner's appeal point was that the trial tactical plan of the State itself resulted in a total frustration of due process; the many cited improper questions, remarks, comments and acts served only to present to the Court the validity of unfairness of the trial plan and tactic itself.

The Texas Court of Appeals (Appendix A, page 8) stated:

> ". . . asking the harmless leading question is not commended; yet, we note that the Courts seldom reverse a case because the questions are leading,"

citing the *Deems* case[18] and the *Pilord* case[19] and the *Bell* case[20]

However, none of those cases are remotely applicable here; the substantive, irreparable harm done to the Defendant Tucker is unprecedented in Texas cases; the Court need only review Appendix C and D attached hereto to see the totality of bad faith, impropriety and repeated need for the Court's cautionary charges.

The injection of the lie detector tests reflecting Defendant's guilt is a direct invasion of the fundamental duty of the trial jury to determine innocence or guilt; once this statement was made, with the deliberate and planned effect, the Defendant was faced with such a prejudicial fact that nothing he could do, or the Court by instruction, could wipe this from the minds of the trial jury.

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18. *Deems v. State,* 265 S.W.2d 96.

19. *Pilord v. State,* 285 S.W.2d 230.

20. *Bell v. State,* 313 S.W.2d 606.

Consider the many critical facts supplied by the prosecutor by asking the questions to his witnesses by suggesting the answer in the question.

The defense was that the inculpatory accomplice witness Whitehurst was not worthy of belief and was testifying to save his life; all facts tending to corroborate or give weight to his testimony was of first importance to the Defendant. These questions were not the harmless leading questions mentioned in passing, by the Texas Appeals Court in its opinion.

The Court had to repeatedly sustain objections, admonish the jury to disregard prejudicial matter, and admonish counsel for the State (See Appendix C & D).

The Texas Courts of Criminal Appeals recognized that a question may be asked of an accused, or of a witness, in such a manner as to get before a jury a prejudicial fact which would call for reversal. *Rogers v. State,* 101 S.W.2d 255. See also 42 Tex. Jur. p. 203 and cases cited therein.

This was done in the instance of "Murder Incorporated"; the horse operation; the bellhop incident; the missing or stolen record questions; the conviction and death sentence of principal; the color of the boots; the jewelers pin on the cigarette lighter; the mannerism of pinching out cigarettes, and many other hostile or corroborative tenders by use of the improper question or "unsworn comment" device.

The duty, obligation and responsibility of the State's district attorney should be no less than that required of the United States attorney in *Berger v. United States,* supra; wherein the Court stated:

> "The United States attorney (State's attorney here) is the representative not of an ordinary party to a

> controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore in a criminal case is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold arm of which is that guilty shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. It is fair to say that the average jury, in a greater or lesser degree, has confidence that these obligations which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should carry none."

The manner that the trial, conviction, and death sentence of the co-defendant was put into evidence; the lie detector tests showing guilt comment; the "Murder Incorporated" theory; the personal attacks on defense counsel; the corroboration of key witnesses by the prosecutors own statements; the personal guarantee or the district attorney of no promise to induce the inculpatory witness Whitehurst to testify; the injunctions between doctors; the horse operation, the inferred document thefts and the inference of immoral conduct; reflect the depth and extent of the improper trial tactic by the State's prosecutor.

A Writ of Certiorari should be granted to review an unprecedented abuse of the obligation of the state's attorney in successfully inflaming and prejudicing the trial

jury by the improper trial tactics which effectively denied to the Petitioner his federally protected right to due process under the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The application for the issuance of a Writ of Certiorari should be granted to review the questions presented by Petitioner Tucker.

1. The question of the denial of the federally protected right of confrontation and cross-examination in the admission of evidence that the principal was tried, convicted, and sentenced to death, in the trial of an accomplice under the applicable Texas statutes involves a fundamental constitutional right which the Appeals Court of Texas has recently held to be permissive in a decision of considerable consequence to this Defendant and future Defendants tried under the Texas laws on Principals, accomplices and accessories.[21]

2. The failure of the district court to grant a mistrial when the prosecutor injected the "Murder Incorporated" testimony raises a question as to whether or not this prejudicial tender violated the constitutional guarantee of "Due Process" under the Fourteenth Amendment.

3. The prosecutor's remark to the Court; that the State had "lie detector" tests showing the guilt of the Defendant effectively denied the Defendant Tucker the right to "Due Process" and a fair and impartial trial in violation of the Fourteenth Amendment to the United States Constitu-

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21. Articles 65, 70, 77 and 80, Vernon's Annotated Penal Code of State of Texas.

tion and equal protection of the law under Article I, Section 10, of the Texas Constitution.

4. The prosecutor's plan and tactic of using improper leading and suggestive questions, side bar remarks, comments and innuendoes to prejudice the trial jury effectively frustrated the federally protected right to due process, and confrontation and cross-examination in violation of the VI. and XIV. Amendments to the United States Constitution.

Petitioner submits that these are Federal questions involving substantial violations of the federally protected rights of the Petitioner resulting in his unlawful conviction and sentence to ninety-nine (99) years to serve for the crime of murder.

For the reasons set forth heretofore, Petitioner respectfully requests that a Writ of Certiorari issue.

Respectfully submitted,

EDDINGTON & FRILOUX

By: _____

C. ANTHONY FRILOUX, JR.
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Houston, Texas 77002

Attorney for Petitioner

APPENDIX "A"

No. 43,226

ROBERT D. TUCKER, JR.,
Appellant

v.

THE STATE OF TEXAS,
Appellee

Appeal from Harris County

OPINION

The offense is that of being an accomplice to the crime of murder with malice; the punishment, ninety-nine (99) years.

Appellant's first ground of error is that the jury heard not only that one of the principals had been found guilty, but also that death had been the punishment in this principal's case.

It is axiomatic that it is inadmissible to prove that another, jointly or separately indicted for the same offense, has been convicted or acquitted. Bacon v. State, 183 S.W.2d 177, Barton v. State, 361 S.W.2d 716.

Another situation is presented when the accused is charged as an accomplice and evidence is offered to show that a principal is guilty of or has been convicted for the same offense. In the early case of Arnold v. State, decided

by the Court of Appeals in 1880, 9 Tex. Ct. App. 435, the court said, at page 438:

> "An accomplice, under our Code, is the same as an accessory before the fact by the common law, with very much the same criminal procedure. In order to convict the accomplice, the State must prove the guilt of the principals, and that the accomplice advised, commanded, or encouraged the principals to commit the offence. There are two separate and distinct propositions demanding full proof of the State. The principals not having been tried and convicted, so that the record of their conviction could be introduced to establish their guilt, the State was required to prove their guilt in the same manner and to the same certainty as if they themselves had been upon trial; for their guilt must be shown before the accomplice can be legally convicted."

Next in Crook v. State, 11 S.W. 444, where Crook was charged with being an accomplice, the court, at page 445, said:

> "In a prosecution against a defendant charged as an accomplice, it is essential for the state to establish the guilt of the principal of the crime charged to have been committed by him. In this case it was essential for the state to establish the guilt of John Middleton, the alleged principal, of the murder of James H. Black. Without proof of Middleton's guilt as principal, the defendant could not be convicted as an accomplice."

In Blumann v. State, 21 S.W. 1027, the Court stated:

> "Nor did the court err in admitting proof of the confession of George B. Jones. The appellant was indicted as an accomplice, and Paul Kirschner and George B. Jones were charged as principals, and it

devolved on the state to prove the guilt of the principals."

In Tuttle v. State, 49 S.W. 82, the Court said:

> "The conviction of appellant was for being an accomplice to his principals, T. J. and N. Singleton, in the perpetration of the alleged swindling. On the trial, the judgment of conviction of T. J. Singleton was introduced in evidence. Appellant objected to the introduction of this evidence, 'because said judgment and sentence was immaterial and inadmissible and was not competent as proof of guilt against T. J. Singleton, and because same would tend to prejudice the minds of the jury . . .'"

Later in the opinion, the Court said:

> "We believe that said judgment of conviction was competent evidence to be considered by the jury in determining the guilt of the said T. J. Singleton. It was necessary for the state to make out a case against the principal before it could claim a conviction of appellant, and in our opinion said judgment of conviction was admissible in evidence against said Singleton."

In Aven v. State, 177 S.W. 82, where Aven was tried as an accomplice to arson, the Court said:

> "The record shows that said principal had been convicted some time before the trial of appellant, and that in his case he testified, admitting that he had set fire to the house, and showing his guilt as principal."

Later in Espalin v. State, 237 S.W. 274, 277, the Court, speaking through Judge Lattimore, said:

> "The confession of Garcia was admitted in evidence over the objection of appellant. The weight of authority seems in favor of admitting the confession of the principal, where an accomplice is on trial; it being necessary to show the guilt of the principal, and all evidence being admissible whose legitimate tendency is to show such guilt."

In Waybourn v. State, 19 S.W.2d 60, Rosa Waybourn was convicted for offering an inducement of $300.00 to one Joe Morales to have her husband killed. She was not present at the time of the killing and did nothing to aid the killer after the murder was committed. There this Court, speaking through Judge Christian, said:

> ". . . that Rosa Waybourn . . . prior to the commission of said offense by the said Joe Morales as aforesaid, . . . did unlawfully and willfully promise the said Joe Morales a reward, favor, and inducement, to wit, did promise the said Joe Morales $300 in money, in order to procure the commission of the said offense by the said Joe Morales; the said Rosa Waybourn not being present at the commission of the said offense by the said Joe Morales . . .
>
> "It was incumbent upon the state, in order to meet the allegations of the indictment, to prove beyond a reasonable doubt that Joe Morales killed deceased in the manner alleged, and that prior to the commission of the said offense appellant promised to pay the said Morales as a reward, favor, and inducement $300 in money in order to procure the commission of said offense."

This question arose again in Peddy v. State, 40 S.W.2d 153, in which the Court said:

> "It was alleged in the indictment that Dewey Parker committed the offense, and that appellant, not being

> present at the commission of said offense, and prior to its commission, did unlawfully and willfully furnish arms and aid to said Dewey Parker. It was incumbent upon the state, in order to meet the allegations of the indictment, to prove beyond a reasonable doubt that Dewey Parker committed the offense in the manner alleged in the indictment, and that prior to the commission of said offense, appellant prepared and furnished arms and aid to said Parker for that purpose of assisting in the commission of the offense."

In Aston v. State, 122 S.W.2d 1073, 1074, with opinion by Judge Christian, the offense was accomplice to assault with intent to murder. There the Court said:

> "It appears that the principal had theretofore been convicted of the offense of assault with intent to murder. The charge of the court merely required the jury to find that he had been convicted of such offense. To warrant a conviction of the accomplice the guilt of the principal must be shown. . . . Stated in another way, to authorize a conviction of one as an accomplice 'the state must prove the commission of the offense by the principal to the same certainty as if the principal were on trial, and therefore beyond a reasonable doubt.' "

Later in the opinion, the Court said:

> "The fact that the principal had been convicted would not have prevented the appellant from seeking to show that he (the principal) was not guilty."

Finally, in the recent case of Schepps v. State, 432 S.W.2d 943, Schepps' conviction as an accomplice in the commission of the offense of printing and making a counterfeit cigarette tax stamp was reversed. In an opinion on State's motion for rehearing, we said:

> "The State, of course, was required to prove the guilt of the alleged principals in the case at bar in order to convict the appellant as an accomplice, and it was entitled to present all the legitimate evidence it possessed to sustain its burden of proof despite the fact the evidence already presented appeared to have clearly established that element of the offense charged. The State, however, because of its burden of proof, was not entitled to introduce the extrajudicial confessions of three of the alleged principals in violation of the appellant's federal and state constitutional right of confrontation.
>
> "In the case at bar, despite appellant's objections, the State made no effort to show that the appellant had previously been afforded an adequate opportunity to be confronted by and to cross-examine the three principals whose confessions were used and that they were presently unavailable to the State so as to bring the case within the recognized exception to the constitutional right of confrontation."

Although Schepps, supra, has effectively overruled some of the cases cited above to the extent that they allow introduction of the principal's confession in the trial of the accomplice in violation of the Sixth Amendment right to confrontation, these cases are still authority for the rule that the State must prove beyond a reasonable doubt the guilt of the named principals and that the State may use all competent evidence in doing so.[1]

This, we conclude properly disposes of the first phase of his ground of error number one. As to the second, where the witness testified that the principal had received death as the punishment for his complicity in the offense,

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1. Compare Steele, *Criminal Law and Procedure*, 24 Sw. L.J. 229, 239 (1970).

we note the following from the record. The State's principal witness was one Delmonte Whitehurst, who had given two statements to the police concerning his complicity in the offense. When called upon by the State's attorney to explain the discrepancies, he stated in effect that at the time the first confession or statement was taken, "My nephew had already given statement of committing and being the trigger man and he picked the gun and car. I went along with him. When we went to Newton on cattle theft charges, I promised I wouldn't testify in court and wouldn't do anything to see him get the death penalty, and if he got it he would get it on his own.

"Q. Did he?
"A. Yes, sir."

At this juncture, counsel for the defendant approached the bench and the court instructed the bailiff to retire the jury, and when they returned to the courtroom, the court charged the jury as follows:

> "Members of the jury, the Court at this time instructs you you will not consider the last question of State's Counsel or of the witness' answer thereto for any purpose in arriving at your verdict in this case and you will wholly disregard the same."

It is apparent from the above that the accomplice witness injected the statement about the death penalty into the case originally by means of an unresponsive answer. As the Court held that the judgment and sentence in Tuttle, supra, was admissible, the Court was, therefore, also holding that the penalty assessed the principal was admissible and we agree. The cautious trial court, in the case at bar however, attempted to soften the blow that

the extreme penalty carried, by instructing the jury not to consider it. Ground of error number one is overruled.

Ground of error number two is that the court erred in failing to grant a motion to take the depositions of certain named witnesses. Appellant's counsel informed the court that he desired to take the depositions in question because the named witnesses were adverse witnesses. The court replied, "Your saying that they are adverse witnesses doesn't make them so. What effort have been made to talk to them to see whether they would talk to you or not?" Certainly the court, under Art. 39.02, V.A.C. C.P., has discretion in whether or not he shall permit the taking of depositions. As appellant failed to present good cause to the court, the court did not abuse its discretion in denying the application.

The appellant's third ground of error relates to the asking of questions concerning the existence of a conspiracy between appellant, Whitehurst and others to kill other people and in which they called themselves, "Murder, Incorporated." At the outset we observe that the following transpired and the following objection was made:

> "Q. Did you attempt to set up any type of organization in regard to the killing of people?
> "A. Yes, sir.
> "Q. All right. Who did you set it up with? Who did you talk to in regard to setting this thing up?
> "A. Well, four or five of us.
>
> "MR. BOBBITT (Defense Counsel): I object to who he talked to."

We find at other times the following information was secured after an objection had been overruled:

"MR. JAMES (State's Attorney): What did you name this organization, Delmonte?

"WHITEHURST: Murder, Incorporated.

"Q. Now, how many times in all did you see this particular Defendant, Robert D. Tucker, Jr.?
"A. Oh, about five occasions.
"Q. All right. Would you tell this jury the nature of each occasion, what was the purpose of the meeting and what occurred? Let's take the second one since you have already told us about the first one.
"A. The second was for the same purpose, to find somebody to do a job.
"Q. What about the third one?
"A. The third was the same.
"Q. What did you understand him to mean when he said do a job?
"A. To get somebody killed.
"Q. And was the fourth one for the same purpose?
"A. Yes, sir.
"Q. What about the fifth one? Who was present during the fifth one?
"A. Four of us were present.
"Q. Who all were they?
"A. Tucker, Burkenhalter(sic), Roy Brashier, and myself.
"Q. Had anyone other than you and those people been present at the other four meetings that you can recall?
"A. On one occasion."

Once it had been established that the named group had as its purpose the killing of others, we conclude that nothing more was added by giving the name which they assigned to themselves. There is no implication in this record that they were connected with any other group of

persons anywhere in the world, such as the Mafia, as appellant contends. Further, we note that in Saddler v. State, 320 S.W.2d 147, 149:

> "The rule is well settled that the acts and declarations of one conspirator during the furtherance of the conspiracy are admissible against the other conspirators. 4 Branch's Ann. P.C. par. 2243, pages 602 and 603; Weston v. State, 164 Tex. Cr. R. 222, 297 S.W.2d 681; Arguero v. State, 164 Tex. Cr. R. 265, 298 S.W.2d 822, and Angle v. State, Tex. Cr. App., 306 S.W.2d 718. This rule applies though the act or declaration occurred out of the presence and hearing of the conspirator on trial. Braley v. State, 156 Tex. Cr. R. 15, 238 S.W.2d 539."

This rule would authorize the above entire testimony.

Appellant's fourth ground of error is that the "prosecutor's deliberate remark that he had a polygraph test indicating the Defendant's guilt, was reversible error." The issue arose as follows: When being questioned by appellant's own counsel, appellant was asked this question, "Robert, when you was (sic) first carried down to the Pasadena Police Department, was (sic) you asked to take a lie detector test?" Answer: "Yes, sir." At this juncture, the prosecutor injected the following: "We will have no objection to this if we are allowed to show any lie detector tests showing his guilt." Objection to this side bar remark was promptly sustained with instructions not to consider the same. The question is: did the appellant's counsel by his own questioning open up the question of a lie detector test. We have concluded that he did and that no reversible error has been reflected by the side bar remark.

Appellant's fifth ground of error relates to the asking of some twenty-three alleged leading questions, some twelve remarks of the prosecutor, and some twenty-seven remarks, questions and evidentiary tenders. Assuming, without deciding, that this is a proper presentation in the brief under Art. 40.09, Sec. 9, V.A.C.C.P., we will attempt to discuss first the leading questions. In Hill v. State, 161 S.W.2d 80, this Court said: "Asking the harmless leading question is not commended; yet, we note that the courts seldom reverse a case because the questions are leading." This has been followed by this Court in Deems v. State, 265 S.W.2d 96, Pilard v. State, 285 S.W.2d 230, Bell v. State, 313 S.W.2d 606, and recently in Ortega v. State, ____S.W.2d____ (No. 43,084).

As to the remainder of the alleged mistakes or errors, appellant's presentation in his brief by reference to page numbers only makes it extremely difficult for this Court to locate said errors and make proper disposition thereof. It is suggested that the actual questions, testimony and remarks of counsel complained of be quoted in the brief.

In Rae v. State, 423 S.W.2d 587, at 589, this Court said:

> "In this ground of error appellant attempts to join in one complaint some nine separate and distinct remarks made by the district attorney, some being made in his closing argument on the issue of guilt or innocence and the others in his argument on the issue of punishment.
>
> "Art. 40.09, Sec. 9, C.C.P., requires that the brief of the defendant 'shall set forth separately each ground of error of which defendant desires to complain on appeal.' See Johnson v. State, Tex. Cr. App., 418 S.W.2d 522, 527. . . ."

Appellant's final ground of error is that the court erred in denying the motion for instructed verdict on the grounds that the testimony failed to meet the tests required to "corroborate" the testimony of the accomplice witness Whitehurst. The wording of this contention implies or accepts the fact that Whitehurst was an accomplice witness and did make a complete case against the appellant which clearly established his guilt as an accomplice to the eventual murder. The question then presented is: was Whitehurst corrobroated.[2]

The undisputed evidence shows that Dr. Robert Pendleton, who was a physician and part owner of the Red Bluff General Hospital, was murdered on December 9, 1966. Dr. Pendleton died of wounds as a result of gun shots fired from a clump of bushes, adjacent to the hospital in which the murderer was hiding. The testimony shows that the murderer then left the scene and was picked up in a car with similar characteristics to that described by Whitehurst as being his automobile. The evidence shows that Whitehurst's nephew was convicted of the actual murder of Dr. Pendleton and given the death penalty.

A Dr. Burkhalter was shown to be a part owner of the hospital. Appellant was employed at the hospital at times prior to and after the date alleged in this indictment.

The accomplice witness Whitehurst testified that he at some time prior to the homicide operated a junkyard and that appellant approached him at the junkyard, requesting that Whitehurst secure someone to commit a murder. Whitehurst further testified that he, the appellant, Dr. Burkhalter, and a principal named in the indictment were

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2. Art. 38.14 and Art. 38.17, V.A.C.C.P.

present at a meeting during which Dr. Burkhalter named Dr. Pendleton, the deceased, as a victim of their murder conspiracy and told Whitehurst they must find a man to do the job quickly.

We look first to the testimony of Mrs. Haley in order to determine whether Whitehurst's testimony was sufficiently corroborated. She lived adjacent to the junkyard operated first by Whitehurst and later by Coon. Mrs. Haley saw appellant at the junkyard at least twice in the presence of Whitehurst prior to the homicide. She was certain of the appellant's identity because while she had been a patient in the Red Bluff General Hospital, appellant had administered an injection in her arm and had broken the needle which was itself a traumatic experience.

The witness Coon, who later bought the junkyard from Whitehurst, said that the appellant came to the junkyard, looking for Whitehurst, and told Coon, "He needed to get hold of him [Whitehurst], he had a job he needed done on a professional friend of his and if he did it himself . . . he would be easily detected."

It was shown by the testimony of Dr. Pendleton's brother that a litigation between Dr. Burkhalter and Dr. Pendleton was instituted. The deceased's brother's testimony, as well as that of the appellant established that Dr. Burkhalter left the hospital on October 5th and appellant resigned at the same time because of the dispute between Dr. Pendleton and Dr. Burkhalter.

Appellant testified that he returned to such employment a week after Dr. Burkhalter's return to the hospital on December 20th.

We have concluded from the above quoted testimony and the record as a whole that Whitehurst's testimony was sufficiently corroboated and we find the evidence sufficient to support the conviction.

The judgment is affirmed.

Morrison, Judge

(Delivered November 25, 1970)

APPENDIX "B"

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

Austin, Texas, Jan. 27, 1971

Dear Sir:

This is to advise that the Court has today overruled without a written opinion the Appellant's Motion for Rehearing in Cause No. 43,226, Robert D. Tucker, Jr. vs. State of Texas.

Sincerely yours,

Glenn Haynes, Clerk

APPENDIX "C"

The prosecutor constantly suggested leading testimony in his questioning. This occurred on the following pages of the record:

Record & Page

1. R., p. 263, lines 20 to 21 - leading - obj. - sustained;
2. R., p. 308, leading - obj. - sustained;
3. R., p. 309, leading - obj. - sustained;
4. R., p. 314, leading - obj. - sustained;
5. R., p. 341, leading - obj. - sustained;
6. R., p. 344, leading - obj. - sustained;
7. R., p. 351, leading - obj. - sustained;
8. R., p. 364 to 365, leading - obj. - sustained;

Counsel instructed not to lead witness

9. R., p. 372, leading - obj. - sustained;
10. R., p. 396, leading - obj. - sustained;
11. R., p. 444, leading - obj. - sustained;
12. R., p. 455, leading - obj. - sustained;
13. R., p. 457, leading - obj. - sustained;
14. R., p. 458, leading - obj. - sustained;
15. R., p. 462, leading - obj. - sustained;
16. R., p. 463, leading - obj. - sustained;
17. R., p. 586, leading - obj. - sustained;

Instruction to jury to disregard

18. R., p. 670, leading - obj. - sustained;
19. R., p. 674, leading - obj. - sustained;

Jury Instructed to disregard

20. R., p. 680, leading - obj. - sustained;
21. R., p. 724, lines 6 to 7, leading - obj. - sustained;
22. R., p. 724, leading - obj. - sustained;
23. R., p. - 724, leading - obj. - sustained;

APPENDIX "D"

Consists of remarks by the prosecutor during the course of the trial; this includes the following:

Record & Page

1. R., p. 368, Comment - obj. - sustained;
2. R., p. 318, Comment - obj. - sustained;
3. R., p. 399, Comment - obj. - sustained;
4. R., p. 402, Comment - obj. - sustained;

Jury instructed to disregard remarks

5. R., p. 411, lines 17 to 20, Comment - obj. - sustained;

Jury instructed to disregard

6. R., p. 422, lines 9 to 11, comment ;
7. R., p. 442, comment - obj. - sustained;
8. R., p. 455, question - obj. - withdrawn;
9. R., p. 465, comment - obj. - sustained;

Jury instructed to disregard

10. R., p. 665, lines 23 to 25, comment - obj. - sustained;
11. R., p. 752, argument - obj. - sustained;

Jury instructed to disregard

12. R., p. 805, argument - obj. - sustained;

Counsel admonished